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The Judiciary in Contemporary Society: Korea

Chang Soo Yang*

I. INTRODUCTION

An examination of the judicial system in Korea draws attention to a rather startling contrast; while the continuum of Korean history extends back some five millennia, the present independent judicial system has existed for only four decades.¹ As a developing country, Korea possesses little experience with modern western legal systems. With a long tradition of its own, resources and efforts have been expended to adopt modern western legal culture and assimilate it into local environments in Korea.

On the other hand, since its liberation from Japan in 1945, Korea has experienced complete and massive social change. During the last four decades of economic growth, Korea was transformed into an industrialized society.²

Industrialization³ and urbanization⁴ have changed literally all social life aspects.⁵ Traditional systems of conflict resolution, such as conciliation mediated by family or village lords outside courts, are restricted or obsolete. Critical, compassionate, and growth-oriented jurists must alleviate these problems.

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¹ With the forced annexation of Korea by Japan in 1910, Korea lost the opportunity to further develop a system of its own which had been built by the Kap-O reforms of 1894.

² See generally KOREAN ECONOMIC DEVELOPMENT (Jene K. Kwon ed., 1990).

³ The gross National Product has grown from 8.1 billion U.S. dollars in 1970 to 210.1 billion U.S. dollars in 1989. Per capita GNP was 252 U.S. dollars in 1970, and 4,968 U.S. Dollars in 1989.

⁴

| | 1960 | 1970 | 1975 | 1980 | 1985 | 1987 |
|------------|--------|--------|--------|--------|--------|--------|
| Total | 24,989 | 31,466 | 34,679 | 37,436 | 40,448 | 41,217 |
| Urban | 6,997 | 12,593 | 16,793 | 21,434 | 26,465 | 29,010 |
| Urban as % | 28 | 40 | 48 | 57 | 65 | 70 |

In thousands. Population in cities with 50,000 people or more.

ECONOMIC PLANNING BOARD, KOREA STATISTICAL YEARBOOK, various years.

⁵ In 1965, 56.6 percent of those employed worked in agriculture, forestry, and fishery, 12.2 percent in mining and manufacturing, and the remaining 31.2 percent in infrastructure and services. By 1987, the shares had changed to 21.9 percent, 27.5 percent, and 50.6 percent, respectively.

II. RECRUITMENT OF JUDGES

A. *Bar Examinations In Korea*

The qualifications for judges as prescribed by the Court Organization Act (COA) are:

- 1) completion of a two year training program at the Judicial Research and Training Institute (JRTI) of the Supreme Court after passing the national judicial examination ("Judicial Examination"), or
- 2) possession of qualifications as a prosecutor or an attorney.

The latter qualification identifies a group of prosecutors and attorneys who began practice before the establishment of JRTI in 1970. Because the number of judges falling into this category is small and continuing to decrease, this group is not treated in the following discussion.

Therefore, to become a judge in Korea one must first pass the national bar examination and then be admitted to judicial training. While no specific educational qualification to take the examination exists, it would be extremely difficult for a person to pass the examination without completing a four year law school course or the equivalent.⁶ Only 4,860 applicants have passed the examination during the period from 1949 through 1990. A total of 206,116 took the examination during the same period (The repeaters are counted more than once). The percentage of those who passed the examination is barely 2.4%.⁷

The examination is administered once every year by the Ministry of Government Administration. The most discussed aspects with regard to the bar examination concerned the constitution of examiners, the type of tests and criteria of grading, the number of successful applicants, the qualification of applicants, and the oral examination.⁸ Some problems were partly solved or improved, although a few remain unsettled. These include the number of successful applicants, type of examination questions, and subjects of examination.

⁶ Statistics show that in the last three years only three applicants who possessed no university education passed the examination.

⁷ For some relevant statistics, see *infra*, note 9.

⁸ See generally, Kiljun Park, *Problems concerning the Reform of Legal Education in Korea*, 6 KOREAN J. COMP. L. 67-91 (1978); Kai-Kwon Choi, *Legal Education in Korea: Problems and Reform Efforts*, 74 SEOUL L. J. 104-22 (1988).

The Korean Lawyers' Association and law professors argue that substantial changes should be executed in some subjects of the examination mainly because they are irrelevant to the qualification and impose too great a burden on the applicants. Yet, consensus has not been reached between these two groups of legal professionals as to the optimal number of successful applicants. Practicing lawyers insist on reducing the number of successful applicants on the ground that the quality of lawyers would be lowered with the numeric expansion of lawyers. Alternatively, law professors argue for the increase in the number of successful applicants for the bar examination.

B. Aspiration for Judgeship

Due to the Confucian influence in Korea, public service was considered the most prestigious occupation a man could hold. Judgeship as a kind of public service was strongly preferred. This tendency has changed little in spite of tremendous private sector growth. Moreover, of all legal professions, a judgeship is still highly esteemed.

Students who have succeeded in the national bar examination upon or before graduation from colleges of law or departments of law,⁹ enter the JRTI for a two year apprenticeship with the judicial and prosecution branches of the government and for a brief period with practicing lawyers. After the apprenticeship, they may choose one of the above branches as judges or prosecutors, or enter the practice of law (some men, who have not completed their military duty, are taken by the Judge Advocate departments of the Korean Armed Services).

Among the JRTI trainees, preference for judgeships has increased in recent years. According to a survey, applications for judgeships exceeded

⁹ Since 1983, the number of successful students in the national bar examination is fixed at 300 per year. Only about 2.5% of the applicants pass the examination.

| year | applicants | passers | percent |
|------|------------|---------|---------|
| 1970 | 2,531 | 49 | 1.9 |
| 1972 | 3,215 | 80 | 2.5 |
| 1974 | 3,311 | 60 | 1.8 |
| 1976 | 3,625 | 60 | 1.7 |
| 1978 | 4,153 | 100 | 2.4 |
| 1980 | 4,868 | 141 | 2.9 |
| 1982 | 7,386 | 300 | 4.1 |
| 1984 | 9,870 | 300 | 3.5 |
| 1986 | 11,089 | 298 | 2.8 |
| 1988 | 11,209 | 300 | 2.7 |
| 1990 | 11,697 | 298 | 2.6 |

prosecutors applications by two to three times. The fact that judges enjoy comparatively more stability and autonomy in their jobs might explain this phenomenon. When more applicants than the number of vacancies in judgeship exist, selection depends on bar examination and JRTI scores.

Recently some of the excellent JRTI trainees have entered the practice of law and specialize in the field of international transactions or labor law. However, in general the courts have no difficulties in recruiting the best young jurists.

C. Dichotomy in the Legal Profession

As previously mentioned, one must pass the national bar examination to become a judge. Moreover, the Lawyers Act provides that only a person who has successfully passed the Judicial Examination and completed the required course at the JRTI is qualified to be a lawyer.¹⁰ This means that a professor of law, even with many years of teaching and research experience, cannot become a judge or a lawyer, unless he passes the bar examination.¹¹ Nearly all students in Korea who want to be a law professor prefer to study abroad after graduation rather than enter JRTI for the apprenticeship and apply for the national bar examination. Almost all JRTI graduates aspire to be a judge or a prosecutor or to practice as an attorney. Only four university professors are qualified as a lawyer. Alternatively, judges, including supreme court justices, have no law professor experience.

Dichotomy can be found in other aspects of the legal professions. In relation to legal education, for example, a dual system is maintained: basic legal education is offered by the law colleges and practical training is managed solely by the JRTI. Unfortunately, these organizations are neither connected nor cooperative with each other. Negative effects of this dichotomy begin with each group's perception toward its counterpart. Legal scholars regard practicing lawyers as those with weak academic bases and practicing lawyers treat scholars as those lacking a sense of reality.

¹⁰ Additionally, those having passed the Judge Advocate Examination and training examination and have been appointed as judge advocates of the armed forces, become qualified to be a lawyer after ten years of service.

¹¹ This also applies to Justices of the Constitutional Court.

D. Assignment and Promotion of Judges

1. Qualifications

Qualification for judges as prescribed by the Court Organization Act depends upon completion of the courses at the JRTI after passing the national judicial examination. Because of this qualification, along with the fact that no probational or assistant judge system exists in Korea, judges under thirty years of age are not uncommon. Concerns exist that these young judges might lack the social experience upon which their judgements would be based.¹² As long as the role required of a judge is not merely that of a legal technician, the qualification for appointment should include, in addition to legal knowledge, some extent of a social career which will prove the would-be judge's recognition of social flow and capability of judgement rooted in his experiences.

Various proposals have been made regarding this issue. It has been proposed, for instance, that judges should be recruited from among lawyers who have already practiced law like United States judges. Although some justices of the Supreme Court and Constitutional Court are recruited in this way, adopting this recruitment qualification is not within the realm of possibility under the current judicial system's substantial amendments.

2. Assignments

No judge is dismissed or forced to retire from office in the course of his good behavior. This is to protect the judges from being swayed by improper political influences. However, in the past, judges were sanctioned merely because of specific decisions they made against the interests of ruling powers. The current assignment and promotion system¹³ allows the Chief Justice to move a judge to an undesirable position. This bureaucratic nature of the court personnel system can still function as a barrier against creativity and a positive judicial attitude. It sometimes accelerates early retirement, and creates difficulties in maintaining experienced judges.

¹² In fact, a newly appointed judge is appointed as a member of a collegiate court of three judges in the district court, one of whom normally has experience of more than ten years in adjudication, and as a presiding judge, totally controls the cases heard by the collegiate court. After this "by-seating" for about five years, he is appointed as a "Single Judge" who presides over a case and decides it by himself. However, even a newly appointed judge would handle some minor cases, such as summary procedure in both civil and criminal cases and issuing of a warrant of arrest, etc.

¹³ See *infra* text accompanying notes 17-19.

Difficulties in maintaining experienced judges also relates to salary allowance. Salary for a judge is surprisingly small compared to that of a private practice lawyer at the same career level, because the current salary level is fixed in balance with government officials. The relatively small amount of salary for judges lends to hardships in maintaining middle-aged judges who might constitute the backbone of the courts.

The general career life of a legal professional in Korea might be described as starting as a young inexperienced judge and ending as an old skillful attorney-at-law, as opposed to the United States counterpart. Changes and improvements must be effected, though no alternative has yet been found.

III. EDUCATION OF JUDGES

A. *Pre-Recruitment Education: The Judicial Research and Training Institute*

Education and practical training in the JRTI is the first step for every potential judge. Passers must attend for two years. In practice, the final systematic and composite for future judges is created.

The courses in the JRTI consist of one year of lecture and another year of apprenticeship in courts, public prosecutor's offices, law firms, or lawyer's offices, and several other public organizations. Other public organizations include the Constitution Court, the Office of Customs Administration, the Office of Patent, the Labor Committee, the mass media, etc. These are included to expand the social experience and knowledge of future judges in special fields. However, little can be expected with a total of one month's training in these non-legal institutions.

The contents of the JRTI lecture require substantial changes: currently provided programs overemphasize rote memorization of precedents and clerical court skills rather than cultivation of the ability to creatively and positively respond to rising social changes.

B. *Post-Recruitment Education*

As previously mentioned, systematic and composite education is not available to judges after appointment. Judges are merely given opportunities to study in foreign countries for short periods of time (approximately one year), and during that period they further their knowledge in areas of interest or personal concern. However, the current system does not provide judges with continuing education or retraining. In addition, cooperation between practical and educational organizations can hardly be expected.

According to the decree which prescribes the JRTI's role, the JRTI takes responsibility for retraining judges as well. For that purpose, some programs in the form of group discussions or seminars are provided for in the decree. However, these programs are short term measures and serve relatively few participants.

Some programs for post-recruitment education are prepared by law schools.¹⁴ However, these programs cover the legal profession in general rather than specifically address judges' tasks.

C. Areas Requiring Specification

Rapid social changes, accompanied by urbanization and new situations, give rise to the demands for fundamental reexamination of the current court system, because the present legal regime poorly addresses these factors. The current judge assignment system stresses specialization of judges. For example, in a field requiring both specific and general legal knowledge, appointed judges often must accumulate knowledge while hearing cases because the assignment system fails to take into account an individual's area of expertise. Furthermore, the call for emphasis on specialized courts grows stronger among the bench and bar. Convincing arguments have been made for court reform, especially to establish and maintain courts dealing exclusively and entirely with commercial, labor, taxation, patent, and family cases. While the specialized court system would require judges to be specialists in specific matters, judges would be freed from the heavy burden of accumulating an enormous amount of general knowledge.

IV. TASKS OF JUDGES

A. Heavy Caseloads

Heavy caseloads create obstacles to the systematic improvement of legal services.¹⁵ Normal litigation cases which impose the heaviest bur-

¹⁴ For example, the College of Law of Seoul National University established "The Judicial Development Program" for the re-education of jurists in 1988. It is composed of sixteen lectures, on topics of general interest, delivered by renowned law professors and attorneys.

¹⁵ The following statistics demonstrate the degree of burden. The number shows the average workload of a judge on normal litigation cases which require merit judgments.

| Year | Supreme Court | High Court | District Court |
|------|---------------|------------|----------------|
| 1980 | 640 | 188 | 615 |
| 1982 | 485 | 213 | 774 |
| 1984 | 466 | 174 | 840 |
| 1986 | 462 | 162 | 866 |
| 1988 | 488 | 133 | 681 |
| 1989 | 426 | 144 | 628 |

dens on judges have increased more than 100 percent.¹⁶ Consequently, the court is short of judges. This might prevent the court from guaranteeing the citizen's right to trial because of chronic trial date tardiness.

Distribution of judges relative to the population is approximately 42,000 citizens per judge. Whereas the average judge ratio is approximately one per thousand in some other countries, this statistical information on Korea clearly indicates a shortage of judges. Moreover, dearth of judges will not improve in the near future; the number of judges will only increase to 1,261 by the year 2000 according to the recruitment plan of the Ministry of Court Administration.

B. In-Court Assistance for Judges

The COA prescribes that the court may hire assistant researchers to reduce the judicial work load. However, it is doubtful whether these in-court assistants have proven as effective in practice as the statutory provision originally intended.

1. Judgement Researchers

Judgement researchers conduct research and studies in connection with trials and judgement of cases in the Supreme Court upon the order of the Chief Justice. They are designated among the judges and assist the Chief Justice and the Supreme Court Justices. Their work is similar to that of an inquiry officer of the highest court in Japan and their position is sometimes compared to the law clerk in the United States. This has become a step that a career judge must pass through.

MINISTRY OF COURT ADMINISTRATION, THE JUDICIARY YEARBOOK 1990.

| ¹⁶ Year | New Cases | Index |
|--------------------|-----------|-------|
| 1979 | 235,571 | 100.0 |
| 1980 | 296,570 | 125.9 |
| 1982 | 385,311 | 163.6 |
| 1984 | 453,795 | 192.6 |
| 1986 | 531,214 | 225.5 |
| 1988 | 502,817 | 213.4 |
| 1989 | 496,798 | 210.8 |

MINISTRY OF COURT ADMINISTRATION, THE JUDICIARY YEARBOOK, various years.

2. Court Researchers

Court researchers collect materials and conduct other research necessary for the judgement of cases concerning tax, patents, labor, and other subjects pursuant to Supreme Court Regulation. Unlike judgement researchers, they need not be judges and can be assigned to lower courts as well as to the Supreme Court. While they could ease caseloads, in practice only the Family Court in Seoul makes use of these researchers.

C. *Alternative Dispute Resolution*

In relation to the heavy judicial workload, few cases are settled by mediation or conciliation. Less than ten percent of family cases are settled by conciliation, a speedy and economic method of dispute settlement.

Dispute resolution must be encouraged, but ironically Korean judges are too busy. It is a general opinion of judges that the heavy case burden is the main obstacle to adopting alternative dispute resolution. More systematic support should be given in this regard so that alternative dispute resolution methods can be used more actively instead of relying on judicial discretion.

D. *Independence of the Judiciary*

Traditionally in Korea, "law" was seen as an agent of rapid political regimentation. The rule of law advocated by legalists as popularly understood in Korean political tradition was little different from rule by autocratic decree.

The present Constitution, which was adopted on September 18, 1987, like prior Constitutions, provides for the democratic fundamentals of the separation of national powers. The judicial power is vested in the courts "composed of judges."¹⁷ This assumes an independent judiciary and guarantees Korean citizens the right to have all judicial matters tried before the courts, including those between citizens and the state arising out of administrative actions. Furthermore, the Constitution allows for the traditional means of checks and balances among the three national branches so that none may misuse their constitutional powers.

The Constitution declares the principle of judicial independence by stating "judges shall rule independently according to their conscience

¹⁷ REPUBLIC OF KOREA CONST. art. 101 para.1.

and in conformity with the Constitution and laws.”¹⁸ Independence of the judicial power of judges is ultimately a means to guarantee the independence of trial. A judge who sits on the bench is assured independence from interference by any state institution. No institution, whether it be legislative, executive, or judicial, is authorized to exercise control over or to give directions concerning trials. No institution may annul or reverse a judgment after a trial except by means of appeal. In order to conduct fair trials and realize the ideal of the rule of law, all judges must be able to exercise their authority according to their conscience, free from any pressure or coercion from outside judicial administrative agencies. To this end it is necessary to fully guarantee the status of judges. To be specific, the independence of judges in the conduct of trials means prohibiting the removal of judges from office without cause, as well as prohibiting the application of any other form of pressure intended to interfere with a trial by a judge.

However, the judiciary has long been criticized that it has not employed its full autonomous power as guaranteed by the Constitution. In other words, judges do not make full efforts to maintain independence. For example, under the present Court Organization Act, the Chief Justice exercises exclusive authority over promotion (including demotion) and transfer of all the lower court judges. A judge can be moved from one court to another without his consent. This exclusive power of the Chief Justice may be used to influence decisions of an individual judge.¹⁹

Moreover, the tenure of lower court judges is ten years. They may serve consecutive terms, but after tenure is completed, they must be newly appointed by the Chief Justice who has exclusive power over judicial appointment. The reason given for not adopting a life tenure system is that it prevents the bench from becoming stale. However, questions remain regarding guarantees of procedural justice.

Judges themselves question the independence of the court. A survey conducted by Seoul Lawyer's Association in March 1980 showed that sixty-seven percent of judges believed independence of the court was not fairly achieved. Eighty-three percent also responded that sometimes interpretation and application of law did not match their conscience and notion of justice. Moreover, eighty-five percent criticized the Supreme

¹⁸ *Id.* art. 103.

¹⁹ For example, in August 1985 the Chief Justice transferred a presiding judge of a high court to a branch court of the district court in the province without any explicit reason. A judge of the Seoul District Court satirically criticized this in a column of a newspaper for jurists. The next day after the newspaper was released to the public, the Chief Justice transferred the bold judge to a branch court located far away from Seoul.

Court's effort to insure independence as insufficient. Recent democratic development has altered this situation to some degree, yet the present court structure still holds political involvement potential.

E. Conservative Bureaucraticism in the Judiciary

Those who critically view the Korean judiciary regard the judge as a "kind of expert clerk," a distinguished bureaucrat, but a bureaucrat nonetheless. This configuration of the judge as a civil servant implies the same basic professional situation as the rest of the executive branch officials: life tenure, secured position, predetermined and largely mechanical career patterns, with each post constituting a mandatory step for advancement.

The bureaucratic nature of the judicial role produces a less positive consequence: a basic lack of creativity. In the performance of his tasks the judge must proceed as the mere operator of a machine designed and built by the legislator, in a most mechanical and uncreative way, in both substantive and procedural matters.

A personnel system similar to the bureaucratic hierarchy promotes the bureaucratic attitude of judges and consequently aggravates the passive and conservative attitude of the courts, threatening independence.

F. Shortage of Legal Service Supply

The current number of judges falls short of growing demand. However, the present-day examination admits only a few applicants through keen competition. Also, because a great portion of these few lawyers are located in urban areas, good quality legal service is not provided in rural regions. Court services such as litigation and pleadings provided by lawyers in other countries are often performed by "quasi-lawyers" (for example, judiciary scriveners) in Korea who have not received systemic legal education.

V. EPILOGUE

Current judiciary problems in Korea are not solely contemporary ones. Rather, a complex situation exists. Judges must secure the ideal of law upon which the legal system is founded and simultaneously adapt to demands of rapid social changes.

What, then, is the definite role of the judiciary in this situation? The most urgent task the judiciary must deal with is to create consensus on its role. It must be found in the old norm that the legal profession has to act as a vital, experimental body determined to improve the understanding or administration of law or the distribution of justice.

